

Attorney Docket No.: J6571(C)
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PRE-APPEAL BRIEF REQUEST FOR REVIEW

Sir:

In response to the Final Rejection mailed on January 17, 2007, please enter the following Pre-Appeal Brief Request for Review. Applicants respectfully request reconsideration of this application in view of the following remarks. A Notice of Appeal accompanies this submission. The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

Remarks/Arguments begin on page 2 of this paper.

REMARKS

Reconsideration and withdrawal of the examiner's final rejection under 35 U.S.C. §§ 102 and 103 is respectfully requested in view of the following remarks.

35 USC §102

The examiner has rejected claims 1 and 2 under 35 U.S.C. 102(b) as being anticipated by Schwartz (2,398,257). The examiner asserts the following:

Claim 1 is rejected under 35 U.S.C. 102(b) as being anticipated by Schwartz (2,398,257). Schwartz (2,398,257) discloses a chamber (1) by at least one wall containing graphics (the at least one wall being the surface including the graphics "CHEWING GUM"), a label (4-band having overlapping ends 9, 10 secured together by any suitable adhesive – col. 2, lines 45-50) removably affixed directly to said wall and said graphics (as indicated in figure 8 and col. 2, lines 39-44 – the band is removably slid as a tube over the package), the label being partially translucent so that a portion of said wall is visible underneath said label (col. 2, lines 12-26), the label and the wall containing graphics which complement each other (col. 2, lines 14-26), wherein said label contains graphics which form a first part of a scene and said wall contains graphics which form a second part of said scene which underlies the first part of said scene (col. 2, lines 14-26), and wherein said wall and said graphics adhered to said wall remain intact when said label is removed (as seen in figures 1 and 8).

35 USC §103

The examiner has rejected claims 3-5 under 35 U.S.C. 103(a) as being unpatentable over Schwartz (2,398,257) asserting that the examiner takes official notice of the use of the claimed elements. Such elements are notoriously old and well known in the art and their use would have been an obvious mechanical design expedient to a skilled artisan. Applicants respectfully point out the following errors in these rejections whereby a prima facie case under both 35 U.S.C. §§ 102(b) and 103(a) has not been properly established.

Schwartz (U.S. Patent No. 2,398,257) discloses a package with a wall containing a printed label wherein the package and printed label are surrounded by a transparent sleeve containing only "vertical spaced dark lines" (see column 2, lines 3 – 26). Schwartz further teaches that the object illustrated in the printed label will appear animated upon movement of the transparent sleeve. Applicants respectfully submit that the spaced vertical lines of Schwartz are not "graphics" nor do they complement the image illustrated underlying the wrapper. The skilled person would understand that "graphics" as that term is used in the instant specification means informative label graphics representing indicia or an attractive design (see page 1, lines 18-19, page 4, lines 13-20). The spaced vertical lines of Schwartz are neither "indicia" nor an "attractive design" and are not "graphics" as claimed.

As stated above, the spaced vertical lines of the wrapper of Schwartz do not complement the image on the printed label underlying the spaced vertical lines. The skilled person would understand that images that complement each other have a logical connection with each other. The spaced vertical lines have no logical connection for Schwartz. Schwartz is concerned with created a moiré-like animating effect when the wrapper is moved in relation to the underlying label. There is thus no logical connection between the spaced vertical lines and the image as is required in the claim. The animating effect described by Schwartz is an artifact caused by the user when she physically manipulates the package as described by Schwartz.

The examiner asserts erroneously that applicants rely on functional differences between the art of record and the instant claims. Applicants respectfully submit function is not relied on, nor is it relevant, as the art of record does not disclose "complementary graphics" as claimed in the instant case. Since this claim element is not disclosed or suggested by Schwartz, applicants respectfully submit a proper prima facie case under either § 102(b) or § 103(a) has not been established.

Supplemental IDS

Applicants note that a signed form 1449 was missing from the present office action in response to the Supplemental IDS submitted by EFS on July 13, 2006, and would appreciate it if the examiner would kindly return the signed form 1449 with his next response.

CONCLUSION

In light of the above remarks, applicants respectfully submit that all claims now pending in the present application are in condition for allowance. Reversal of the final rejection is respectfully submitted. The examiner is invited to contact the undersigned if there are any questions concerning the case.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Alan A. Bornstein", written over a horizontal line.

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